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RECORD OF ORAL HEARING  
UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex Parte* MIKKO PORMA and KIMMO HYTONEN

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Appeal 2009-014780  
Application 10/564,522  
Technology Center 3600

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Oral Hearing Held: September 14, 2011

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Before ROBERT A. CLARKE, CHARLES N. GREENHUT, MICHAEL L.  
HOELTER, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE APPELLANT:

ROBERT F. GNUSE, ESQUIRE  
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1  
2 The above-entitled matter came on for hearing on Wednesday,  
3 September 14, 2011, commencing at 3:18 p.m., at the U.S. Patent and  
4 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Deborah  
5 Courville, a Notary Public.  
6

7  
8 PROCEEDINGS

9 THE USHER: Calendar No. 39, Appeal No. 2009-014780,  
10 Mr. Gnuse.

11 MR. GNUSE: Good afternoon, gentlemen. I'm Bob Gnuse from the  
12 Muncy, Geissler, Olds & Lowe Law Firm, representing the Applicants in  
13 this appeal. I have with me today Mr. Kimmo Hytonen, who came here  
14 from Finland for this case, and he was a co-inventor of the present  
15 application and the sole inventor of the reference. And I'm sure if you have  
16 any questions about the workings of the subject device or the prior art, he'd  
17 be glad to answer any questions you have.

18 The application has been rejected on two grounds, 35 U.S.C. § 112,  
19 second paragraph, and 35 U.S.C. § 103. And today I'd like to confine the  
20 remarks to the art rejection. And while we feel the Examiner is incorrect in  
21 his application of 35 U.S.C. § 112, some of these problems are better  
22 resolved in front of the Examiner in an RCE. And I'm going to leave the  
23 question of the 35 U.S.C. § 112 rejection to the briefs so we can concentrate  
24 on the art rejection, which is more important.

25 The art rejection involves a single reference, which is the previous  
26 work of Mr. Hytonen, one of the co-inventors of the present application.

1 The Examiner feels that Claims 1 to 4 are obvious over the reference, and  
2 Claim 5 was not rejected over prior art. We submit that the Examiner's  
3 rejection is incorrect for a number of reasons. We've pointed out to the  
4 Examiner that the final two paragraphs of Claim 1 are not seen in the  
5 reference, and the Examiner apparently does not disagree with this.  
6 However, the Examiner feels that the two final paragraphs should be  
7 disregarded since they were in an algorithm and should be treated as though  
8 they are part of the prior art. We disagree with this and submit that the  
9 rejection should be removed.

10 The Examiner refers to the Mackay radio case, the Benson case and  
11 the Flook case to support the principle that a mathematical formula or a  
12 scientific principle should be treated as prior art. Well, the first problem  
13 with this logic is that the steps of Claim 1, and especially the last two steps,  
14 are not mathematical formulas. In Benson, there was a mathematical  
15 conversion from a binary coded decimal to a straight binary, which are  
16 clearly mathematical. Likewise, in Flook, there was a calculation of a  
17 numerical value of an alarm limit. However, here, there is a step of  
18 performing part of the velocity changes immediately and delaying the  
19 remainder for a later performance and reading and summing the delayed  
20 parts over a plurality of rounds. These steps are not calculating a number  
21 nor are they stating a scientific fact. The delaying of a parameter for  
22 application at a later time is not a mathematical algorithm.

23 Also, the steps of Claim 1 are a legitimate series of steps of a method  
24 that involves numerical values of applied parameters that are related to  
25 controlling the movement of a crane. As such, this is not merely a formula  
26 making a calculation without any connection to the outside world. Instead,

1 it is used directly to work with an existing apparatus in a real-world setting.  
2 The steps of the method do more than make a calculation. They're used to  
3 control a device and to move an object in real time. Thus, they are not a  
4 mirror mathematical algorithm. Further, it has been accepted that even  
5 computer program claims are patentable if they're associated with a  
6 particular piece of apparatus. Claim 1 describes a crane, a crane control  
7 system and a crane drive. Since the present steps are associated with a  
8 particular crane apparatus, the claim may be patented even if the program  
9 were involved. Likewise, programs are patentable if there is a  
10 transformation of an article. Herein, the velocity requests move the crane to  
11 a different position and thus transform it. So even if a program were  
12 involved, it would be patentable for this reason also.

13 Now, we note that the Examiner has pointed out these three cases on  
14 which he bases his argument about the algorithm, but he has ignored the  
15 *Diamond v. Deere* case, which states that even if there is a formula or  
16 program in a claim, it does not render the rest of the claim non-statutory. So  
17 even if the Examiner was correct that the last two steps were a formula, it  
18 would not make the claim non-statutory.

19 Further, it should be remembered that Benson and Flook cases did not  
20 say that the presence of a formula would make the offending steps to be  
21 treated as prior art, as the Examiner suggests. They were recited on 35  
22 U.S.C. § 101 as being a non-statutory. The Examiner has not made a 35  
23 U.S.C. § 101 rejection. Applicants submit that the Examiner's use of these  
24 cases and the corresponding arguments are improper applications of a 35  
25 U.S.C. § 101 principle to a 35 U.S.C. § 103 situation. If the Examiner thinks  
26

1 that Benson or Flook were applicable, he should have rejected the claim as  
2 being non-statutory.

3 Further, the Examiner states that it would be obvious to include a  
4 delaying step since this is considered to be known prior art. This is stated in  
5 the last four lines of page 4 of the answer and lines 19 to 22 of page 7. The  
6 Examiner does not provide a reference to show that such a delaying step is  
7 prior art. And if this is so obvious, why is there no reference to show this?  
8 Nor does he explain why it would be obvious to use such a step in the  
9 method or the reference. Where is the motivation? Applicants submit that  
10 there is no support for the Examiner's allegation of obviousness of this step.  
11 The Examiner has failed to state a proper obviousness rejection.

12 In the paragraph bridging pages 7 and 8 of the Answer, the Examiner  
13 points out the similarity of figures 1 to 3 of the present application with the  
14 same figures of the reference. The Examiner feels that this indicates that the  
15 present application does not include a patentable invention. Applicants  
16 disagree. The similarity of the claims of the drawings is not definitive of the  
17 absence of differences in the claims. The classic example of this is in a  
18 restriction situation, where a divisional application is identical in the  
19 specification and drawings to the parent application but -- patentably distinct  
20 claims.

21 JUDGE GREENHUT: I'm sorry to cut you off there. Could you tell  
22 us a little bit about the last two paragraphs of Claim 1, the last two steps,  
23 where we start with performing, reading and summing --

24 MR. GNUSE: What do you mean --

25 JUDGE GREENHUT: Could you just describe them for us?

26

1 MR. GNUSE: Okay. The last two steps involve taking the -- this  
2 parameter, the summed acceleration sequences, and they divide them up into  
3 parts, basically, at least two parts, but really, it's in a sequence of parts.  
4 They apply part of it immediately. And we're talking on a time scale of  
5 about 5 milliseconds here. And the rest of the parts are delayed and applied  
6 over a period of 100 milliseconds to get better response to the parameter.

7 JUDGE GREENHUT: So the sequence parts, what are the sequence  
8 parts? They're portions of the velocity?

9 MR. GNUSE: Okay. It might help if I could tell a little about what's  
10 really involved with this case. I think the background is a little bit skimpy.  
11 There's a lot of prior art that goes on back here. This is not -- this invention  
12 is not the only invention in this area. I mean, this goes back, way back. If  
13 you look at the reference, it even refers to an even earlier situation.

14 You have an overhead crane, and you've got a hook hanging down.  
15 When you start to accelerate the crane and it moves across, if you change the  
16 velocity, you're going to get the load swinging backwards, by Newton's  
17 second law, or whatever. By applying the velocity changes in a different  
18 manner, and the prior art shows this as an acceleration sequence, it can  
19 actually slow down this oscillation that you're going to get otherwise from  
20 the thing swinging, okay? So the acceleration is kind of applied at two  
21 different parts, for example. But with current computer systems and other  
22 electronics, it works faster. We're able to make it at a much faster response  
23 time. However, if you make it too short, then you've got huge numbers of  
24 calculations going on, and you've got to store all this information.

25 So to avoid that, they started to do a sort of -- you might call it, like, a  
26 hybrid system. And they measure it at 5 milliseconds, but they apply it over

1 a 100-millisecond time period. And the result is they get a much improved  
2 performance, and it helps the whole situation. That's what they're doing by  
3 taking part of this sequence and delaying part of it and applying it over the  
4 full 100 milliseconds, because this is a whole step further than what's been  
5 done in the prior art, where they're doing it on the larger, 100-millisecond  
6 range.

7 JUDGE HOELTER: I have a question. You talk about the last two  
8 paragraphs of Claim 1. I assume you're talking about the performing some  
9 of the velocity changes step --

10 MR. GNUSE: It's the what?

11 JUDGE HOELTER: -- and they're reading and summing --

12 MR. GNUSE: Right.

13 JUDGE HOELTER: -- the stored sequences step?

14 MR. GNUSE: That's correct.

15 JUDGE HOELTER: In the briefs, though, it seems that the argument  
16 that was presented was that the only difference between the prior art and the  
17 claim, Claim 1, is the -- whether it's on a single program round or several  
18 program rounds.

19 MR. GNUSE: Well, I think there is more to it. If that's all that's in  
20 the brief, I think there is more to it. And we should --

21 JUDGE HOELTER: And if we go to page 9 --

22 MR. GNUSE: Let me --

23 JUDGE HOELTER: And the other thing that puzzles me about your  
24 statement here is it seems that Appellant has already acknowledged that  
25 performing delayed calculations was part of the earlier prior art.

26 MR. GNUSE: Well --



1 JUDGE HOELTER: And so that's why I'm trying to figure out  
2 what -- where do we draw the line here as to what part of this claim is in the  
3 prior art and what is the new inventive --

4 MR. GNUSE: I think it's pretty clear that the first two paragraphs of  
5 Claim 1 are basically the prior art. I mean, they read almost directly on the  
6 claim of the reference. The patentability part comes in these last two  
7 paragraphs.

8 JUDGE HOELTER: But if you go to your specification, paragraph  
9 14, I mean, I'll have to read through that again. But that seems to contradict  
10 what you're just now saying. I mean your page 9 of the Appeal Brief says  
11 that paragraph 14 is a short description of the old method. Okay. So both --

12 MR. GNUSE: I'm sorry. I'm still trying to find the original  
13 specification. Here it is. Okay.

14 JUDGE HOELTER: So if we go to paragraph 14 of the  
15 specification --

16 MR. GNUSE: Right. Yeah, paragraph 14 looks like that is part of the  
17 prior art.

18 JUDGE HOELTER: Okay. And then right around line 30, we talk  
19 about -- let's see. Let's go to line 28. "Some of the velocity changes defined  
20 by the sum acceleration sequences are performed at the definition time of  
21 each sequence, instantaneously, and the rest of them are performed as  
22 delayed." So I'm --

23 MR. GNUSE: Okay. I'm sorry. Maybe there is part of the  
24 invention -- through the end of paragraph 14.

25 JUDGE HOELTER: Well, it says at the very beginning that  
26 paragraph 14, figure 3, shows a flow chart illustrating the method -- shows a

1 flow chart illustrating method for controlling a crane, forming the bases of  
2 the invention, and it goes into it. But these steps are described as already  
3 being in the prior art, because the prior art does talk about forming delayed  
4 calculations. So, like I said, my trouble is I'm trying to figure out where  
5 does the prior art stop in Claim 1 and where --

6 MR. GNUSE: Well --

7 JUDGE HOELTER: And I can see where the difference between the  
8 plurality of program rounds and single program rounds, because that's  
9 expressed in the briefs. But as far as the delayed component, I'm going to  
10 have to ask you to explain to me how the delayed component is part of the  
11 new invention and not part of the prior art.

12 MR. GNUSE: Well, as far as I understand it, the whole last five lines  
13 there in Claim 1 are part of the invention. And there is a lot more to the  
14 invention than perhaps is included in the specification there, and it may not  
15 be as clear as it could be. But the --

16 JUDGE HOELTER: Well, let's go back to paragraph 14 of the  
17 specification. We're talking about the delay, and the very next sentence is  
18 "the above-described method is describing greater detail on finished patent."  
19 And that finished patent was what, 1990s, something like that?

20 MR. GNUSE: Yeah.

21 JUDGE HOELTER: Issued in, yeah, '91. So that's why I'm asking.  
22 Is this delayed component that's now in Claim 1, is that delayed component  
23 part of the prior art as stated in paragraph 14 or is that part of the new step  
24 that's being claimed? That's my difficulty here.

25 MR. GNUSE: Yeah, I understand. I think this is all part of the  
26 invention, the part in the last five lines. I'm not sure if perhaps paragraph 14

1 did get over the line and included some of the new part in there, but there is  
2 a whole difference in the prior art and the present invention as to the level at  
3 which this delay occurs. And the time period is much, much shorter. And  
4 perhaps this isn't brought out in the way that it --

5 JUDGE HOELTER: Well, I agree. The time period, that's relating to  
6 the last two lines of Claim 1. I agree to that whole part of it. But how you  
7 do the calculations, whether you do it as a single, in a single stroke, or do it  
8 in multiple calculation, I understand that. That's part of the last two lines.  
9 It's those three other lines of Claim 1 that you're saying that that's from. I  
10 see a disconnect here, you know, on the record. I'm hearing what you're  
11 saying, but I'm reading what I'm reading, and that's why I'm having trouble  
12 understanding how we can be misunderstanding each other. Is this delayed  
13 part of finished patent 89155, as stated, or is it not part of 89155, as you now  
14 suggest?

15 MR. GNUSE: It was my understanding it was not. I understand this  
16 is somewhat confusing but, you know, from the reading of this --

17 JUDGE HOELTER: Okay. I mean, I don't want to belabor the point.  
18 I'm just -- this is something I'm struggling with.

19 MR. GNUSE: I don't know if we -- would you like to refer to the --  
20 anything to the Inventor?

21 JUDGE HOELTER: Your call.

22 MR. GNUSE: Do you have anything you'd like to say about that?

23 MR. HYTONEN: Yes, I would like to --

24 MR. GNUSE: Yeah, come on. Just -- I don't know if you know what  
25 they're talking about. They're in paragraph 14 here, whether that is part of  
26 the claim, remember Claim 1.

1 MR. HYTONEN: Original method is to divide the control in, for  
2 example, two parts, where we first implement the first part of it that moves  
3 the crane a little bit. And then we wait a certain amount of time so that  
4 when the load swings down, when the load is in the lowest point, we apply  
5 the second part -- develops the change or acceleration, whatever you want to  
6 call it. Now, if we do that every 100 milliseconds, we have to take samples  
7 of the user speed reference and store them. And we have -- then on each  
8 program cycle, we implement the first part of the velocity change, and also,  
9 we go through all our tables to find out if it is time to implement the second  
10 part. But when we go to much shorter control times, then the amount of --  
11 the size of the tables are increasing a lot. And then we have to do  
12 something.

13 And this invention explains a very practical way to do that. It is  
14 working so that we have, let's say, a 5-millisecond cycle time. And on each  
15 5-millisecond cycle time, we take the change of the reference signal, and we  
16 take part of that and implement that velocity change. But then, the second  
17 part of the velocity change, we don't anymore do that for each 5-millisecond,  
18 and we don't go through all our tables in each 5 milliseconds. We take, let's  
19 say, 20 times more pi (ph.) and we go through the whole table in 100  
20 milliseconds. And that is the difference to the first one.

21 And I understand it is very difficult to -- if you are not really  
22 programming -- to understand what is the -- I'm lacking some of these words  
23 here. But this is something that we -- practice. It's implemented and used in  
24 thousands of cranes.

25 JUDGE HOELTER: I don't want to put words in your mouth, but I  
26 want to make sure I understand what you've just said. Please bear with me.

1 I understand that in times past, you would move -- you would use part of the  
2 signal that was sent to the drive to control -- to move the crane?

3 MR. HYTONEN: Um-hum.

4 JUDGE HOELTER: Another part of the signal would have been  
5 acted upon at a later time --

6 MR. HYTONEN: That is correct.

7 JUDGE HOELTER: So you've got, like, a first part -- let's say a real-  
8 time part and a delayed part, if I may use that language?

9 MR. HYTONEN: Um-hum.

10 JUDGE HOELTER: So in the prior art, you had a signal, and it was  
11 broken into those two components, the real-time component and the delayed  
12 component --

13 MR. HYTONEN: Yes.

14 JUDGE HOELTER: -- so that you would reduce the swinging, the  
15 pendulum swinging of the load as you're moving the crane along. Now, in  
16 the present invention, my understanding is that you still have the signal that's  
17 being sent to the drives?

18 MR. HYTONEN: Um-hum.

19 JUDGE HOELTER: You're still breaking that signal up into a real-  
20 time component and a delayed component?

21 MR. HYTONEN: That is correct.

22 JUDGE HOELTER: But that delayed component now is being  
23 further subdivided into a series of discrete steps?

24 MR. HYTONEN: Of course, my English is limited, but it sounds  
25 correct --

26 JUDGE HOELTER: That's why I'm trying --

1 MR. HYTONEN: And it makes fundamental difference in the way it  
2 can be implemented --

3 JUDGE HOELTER: Under the claimed invention, instead of taking  
4 the entire delayed component in one fowl swoop if I may use that  
5 unscientific term, that delayed component has been broken into -- I think it  
6 was 20 subgroups, and you're taking a little slice of each one and adding it to  
7 the previous signal, velocity, whatever it might be, acceleration,  
8 deceleration, so --

9 MR. HYTONEN: Quite exactly -- the way we calculate these -- is  
10 probably would be -- would probably be different, but that is the  
11 fundamental idea.

12 JUDGE HOELTER: Okay, okay.

13 JUDGE GREENHUT: And that's the program rounds? That's the --

14 JUDGE HOELTER: That's the multiple versus the single. But that  
15 then tells me that the first three lines -- or I shouldn't say first three lines --  
16 lines 11, 12 and 13 -- they're performing some of and the rest of them as  
17 delayed, I don't see how that's different from what was done before. And  
18 that was the struggle I was having, because paragraph 14 states, you know,  
19 the rest of them were performed as delayed, and that was described. So it  
20 seems that it's still a real-time and a delayed just like before, only now you're  
21 taking that delayed component and slicing it up even into smaller deltas or --  
22 but I guess I understand the English language barrier, and I don't want to --  
23 so I'm wanting to make sure I understand what the invention is and what the  
24 claims stand for. I mean, I'm sorry, Mr. -- have I misstated?

25 MR. GNUSE: I think you're sort of in the right ballpark here. There  
26 is really a two-level thing going on here, one of which is the old prior art,

1 and this new thing where we're dividing it up even smaller. And you know,  
2 it's your call as to whether the claims are stating it correctly or not, I mean,  
3 but we are basically taking what's known in the prior and doing it a step  
4 further.

5 JUDGE HOELTER: Okay. Then I would like to have you address --  
6 I hope I've not gone over time. I would like to ask you to address, then, why  
7 a -- again, the obviousness, the 103 issue, the difference between the prior  
8 art where those steps were done in one rotation and the new claim here,  
9 where these sequences, these stored sequence parts were performed on a  
10 plurality of program rounds. I'd like to ask you to address the singular  
11 program round of the prior art versus the plurality of program rounds that's  
12 presently being claimed.

13 MR. GNUSE: I can try. First, I'd like to point out that the Examiner  
14 essentially said that the prior art didn't have this in it. So I'm relying on the  
15 Examiner's statement to start with. If I can find the claim again -- thank you.  
16 Certainly, in the last two lines, like you pointed out, we talked about the  
17 plurality of program rounds and how the thing is delayed. That's clearly in  
18 the invention, not in the prior art in any fashion.

19 The previous three lines -- and we're talking about the performing the  
20 velocity changes at a certain time and -- while there is the, in the prior art,  
21 the stored acceleration sequences are being offset a little bit, there's only a  
22 couple of them that are basically being offset to help with the swinging. In  
23 the current invention, we're dividing it much more finely, and we're delaying  
24 them over a much different time period.

25 Now, I'm not sure if this has been brought out the way you would like  
26 in the claim, but that is certainly the basic difference. We feel that the

1 Examiner's statements here are -- the Examiner did not make a proper  
2 rejection under 103. I don't think he supported his statements very well. I  
3 think he's relying on the fact that an algorithm is involved, in his opinion,  
4 and rather than reject it over 101, he's tried to make it a 103 rejection, and I  
5 think it really doesn't fit a 103 rejection. There are elements, parts of the  
6 claim which at least seems like you seem to feel like you could read on the  
7 prior art. The Examiner did not do that --

8 JUDGE HOELTER: No, this was admission. This is Appellant's  
9 admission that that's prior art. That's what I was trying to figure out, because  
10 now you're coming and saying it's not prior art. I'm not dealing with what  
11 the Examiner was saying. If I'm reading paragraph 14 and I'm thinking,  
12 well, and then I'm hearing you today and I'm thinking --

13 MR. GNUSE: Well, obviously, if the Brief admitted something that  
14 was in paragraph 14 -- and again, even paragraph 14 itself refers to a prior  
15 patent, so that would seem to be the case. I don't think that refers to the  
16 invention. Whether it reads the same as the language in Claim 1 or not, it  
17 was not meant to refer to the way that we're discussing it with this 5-  
18 millisecond situation.

19 JUDGE HOELTER: Um-hum.

20 MR. GNUSE: Okay. Does that answer your question?

21 JUDGE HOELTER: No, no, no. I understand. I understand the  
22 difference between -- that seems to be addressing the single versus plurality  
23 of rounds.

24 MR. GNUSE: Yeah. Okay.

25 JUDGE HOELTER: I know --

26



1 MR. GNUSE: If the language you find there in paragraph 14 reads on  
2 a paragraph that's here in Claim 1, then you have, you know, an -- certainly,  
3 you have an argument against it. I don't think we really meant for that to be  
4 stating the invention in this case.

5 JUDGE HOELTER: Okay, because the reason I was focusing in on  
6 this was the statement on Appellant Brief page 9, and the third line down,  
7 that whole paragraph. If we start with the second sentence, the present  
8 invention -- and by that I understand that to mean the Patent Hytonen 193--

9 MR. GNUSE: Right.

10 JUDGE HOELTER: It discloses a method where all the stored  
11 sequence parts, delayed or not, are performed in one and only one program  
12 round. Do you see where I'm reading?

13 MR. GNUSE: You're up at the paragraph, yeah.

14 JUDGE HOELTER: I'm on page 9 of the Appellant's Brief --

15 MR. GNUSE: I have it, yes.

16 JUDGE HOELTER: And the second sentence of that first whole  
17 paragraph is "the present invention" -- which you can -- and I think you  
18 agree with me that that's Hytonen 193. "The present invention discloses a  
19 method where all the stored sequenced parts, delayed or not, are performed  
20 in one and only one program round." So that --

21 MR. GNUSE: I'm sorry, I'm reading this so I can --

22 JUDGE HOELTER: Okay, sure.

23 MR. GNUSE: And I'm sorry. I'm reading -- the second sentence  
24 sounded like a contraction to the third one. Is that the way you're reading  
25 this? It almost sounds like one is saying something and one is saying  
26 something else.

1 JUDGE HOELTER: Well, the third one, the third sentence, it starts  
2 out "in the invention." I take that to be the claims --

3 MR. GNUSE: Well, the second sentence starts out "the present  
4 invention."

5 JUDGE HOELTER: Right. And I understand to be a reference to --

6 JUDGE GREENHUT: The prior art.

7 JUDGE HOELTER: The prior art.

8 MR. GNUSE: I think it must be, yeah. I think it was a mistake in  
9 the -- yeah, I think I agree with you.

10 JUDGE HOELTER: Okay. Because that's how I was reading it.  
11 That's how I understood that.

12 MR. GNUSE: I'm sorry I didn't -- that was caught earlier, but I think  
13 you're absolutely right. Otherwise, the two sentences would be contradicting  
14 each other.

15 JUDGE HOELTER: Exactly.

16 MR. GNUSE: Yeah, I agree with you, yes.

17 JUDGE HOELTER: Okay. So then the invention, if we go to the  
18 third sentence, "in the invention, these sequenced parts can be divided to  
19 perform on several program rounds." And this is this breaking it up into  
20 those finer --

21 MR. GNUSE: Right.

22 JUDGE HOELTER: And so this is where I'd like to see a  
23 discussion, an explanation of why the prior art's one program round and the  
24 present claim's several program rounds, why the one is not obvious in view  
25 of the other, because that's the rejection stated by the Examiner.

26

1 MR. GNUSE: Of course, you have your -- you can have your opinion  
2 that it is -- one would be obvious to the other --

3 JUDGE HOELTER: Well, I'm asking you. I'm trying to get to the  
4 bottom of this.

5 MR. GNUSE: But the Examiner has never said it was obvious.

6 JUDGE HOELTER: But you're entitled to contest that, and that's why  
7 I'm asking, because all that was stated here was "this is not obvious nor  
8 disclosed." How? Why? Give me -- explain that.

9 MR. GNUSE: Okay. I suppose it is because it is a whole nother  
10 range of values, and they've gone a whole nother step forward in the amount  
11 of time that's utilized. The prior art takes the acceleration sequence, it's  
12 called, I believe, and they do apply it in pieces. But in the current invention,  
13 they've gone much beyond that to a whole nother scale. It's like they took  
14 that thing and did something further when dividing it up -- and not only  
15 broken it into a bunch of pieces -- and you could say that's similar to the  
16 other -- what's been done, because it was broken in pieces, too. But here,  
17 we're taking -- we're applying some of the pieces immediately. And then  
18 we're delaying not just a couple of pieces, but 20, perhaps, over a whole time  
19 period in that same 100 milliseconds that was used in the prior art. And  
20 we're doing it for the reason that Mr. Hytonen had mentioned earlier, which  
21 is that you're trying to -- you want to calculate this figure on a short time  
22 period to get better response, but you don't have to store all that additional  
23 calculation. So we're sort of doing a hybrid where we're doing a calculation  
24 over 5 milliseconds, but we're delaying it out over the full 20 milliseconds,  
25 whereas in the prior art, they took the blocks of 20 milliseconds whole and  
26 did it.

1 JUDGE HOELTER: And did it. It's the singular versus the several  
2 program rounds?

3 MR. GNUSE: Yeah.

4 JUDGE HOELTER: Okay.

5 MR. GNUSE: Now, hopefully, that explains what you'd like to know.

6 JUDGE HOELTER: As best we can figure out.

7 MR. GNUSE: Okay. I don't know how we're doing on time.

8 JUDGE HOELTER: Well, we're probably running way over, and I  
9 have to apologize, but if I may get a little bit more indulgence from my  
10 colleagues here, I know you are not -- you said at the very beginning you  
11 were not going to address the 112, but I would like to ask a question.

12 MR. GNUSE: Okay.

13 JUDGE HOELTER: When the Examiner pointed out all the  
14 objections based on 112, second paragraph, why did Appellant not address  
15 them? It seemed that Appellant picked and chose, oh, I'll do this one and I'll  
16 do this one. Is there a reason why Appellant didn't address all of them?

17 MR. GNUSE: I think there is a reason. One of the things that  
18 happened in this case, the First Action, the Examiner, for example, in some  
19 of the rejections, said -- he used "the" and there was no antecedent basis for  
20 it. So in the second, we responded and took out the "the." And then he said,  
21 well, you took the "the" out. Now it's not easy to understand. And it  
22 appeared to be a situation where the Examiner was going to continue giving  
23 us a series of 112 rejections no matter what we did. We were worried about  
24 the prior art rejection. We wanted to get that heard first. We didn't really  
25 care about the 112, but we can sit down with the Examiner later and work  
26 out the 112s.

1 JUDGE HOELTER: Okay, okay.

2 MR. GNUSE: I mean, I know you guys don't want to hear a bunch of  
3 arguments about 112 rejections.

4 JUDGE HOELTER: I have to deal with the record before me.

5 MR. GNUSE: I understand.

6 JUDGE HOELTER: Thank you so much.

7 JUDGE CLARKE: I don't think we have any additional questions,  
8 and thank you for attending the hearing.

9 MR. GNUSE: Okay. I've forgotten where I dropped off here, but I  
10 did want to throw a couple more quick statements in just -- I think I was  
11 talking about how the figures don't really define the claims. And I was just  
12 going to say that even if the drawings did show all the patentable features of  
13 the claims, the Examiner should be giving an objection under 37 C.F.R.  
14 183A that we didn't include it in the new case. That's not an indication the  
15 claims are the same. It's just it should be an objection to the figures don't  
16 show what they should. And that's basically all I really wanted to add. I  
17 think we covered all the other grounds, so --

18 JUDGE HOELTER: Thank you. I appreciate the dialogue.

19 MR. GNUSE: Thank you, gentlemen. I appreciate it.

20 (Whereupon, the proceedings, at 3:53 p.m., were concluded.)

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